

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

November 1, 2012

Elisabeth A. Shumaker
Clerk of Court

In re:

JAMES L. WATSON,

Movant.

No. 12-5142
(D.C. No. 4:04-CR-00182-TCK-2)
(N.D. Okla.)

ORDER

Before **LUCERO, EBEL**, and **TYMKOVICH**, Circuit Judges.

Movant James L. Watson seeks authorization to file a second or successive 28 U.S.C. § 2255 motion challenging his 2005 conviction on multiple counts of armed robbery and related firearms charges. *See generally United States v. Watson*, 207 F. App'x 913 (10th Cir. 2006) (affirming conviction). We deny authorization.

We may authorize a second or successive claim on a prima facie showing that it relies on (1) “newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense”; or (2) “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255(h); *see also id.* § 2244(b)(3)(C). Mr. Watson seeks authorization under § 2255(h)(1) to redress alleged violations of *Brady v. Maryland*, 373 U.S. 83 (1963), citing two items of evidence he contends demonstrate his innocence.

One of these is an affidavit Mr. Watson recently obtained from Carmela Bollinger, in which she avers that he was with her in Las Vegas (State not specified) at the time the robberies were committed in Tulsa, Oklahoma.¹ She also avers that she told the police and prosecution of this fact in 2004, but was threatened and turned away. It defies common sense to claim that this potential alibi evidence is newly discovered. If, as Ms. Bollinger asserts, she and Mr. Watson were together in Las Vegas, he was necessarily privy to that fact, and knew as well that she shared that knowledge, before he was tried, let alone before he filed his first § 2255 motion. In any event, for reasons explained below in connection with the other evidence that Mr. Watson relies on, we are confident that both items of evidence would not satisfy the statutory standard for authorization.

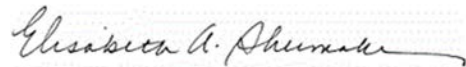
The other evidence is an affidavit Mr. Watson recently obtained from a fellow inmate, Corey Crawford, in which Mr. Crawford avers that he committed all of the robberies for which Mr. Watson was convicted. He also avers that he informed the prosecuting attorney of his guilt in 2004, but was threatened and turned away. This does appear to constitute new evidence, so we proceed to the substantive requirement in § 2255(h)(1) that it “be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [Mr. Watson] guilty of the offense.”

¹ Attached to Mr. Watson’s materials is another affidavit, signed by Charisse Avery, averring that she saw him with Carmela Bollinger in Las Vegas. Mr. Watson does not refer to this affidavit. In any event, our assessment of the force of this affidavit is basically the same as that of the others Mr. Watson expressly relies on.

In that regard, unusual circumstances specific to Mr. Watson’s trial—aside from the substantiality of the government’s overall proof (which included testimony from both of Mr. Watson’s co-defendants)—uniquely undercut the force of the exculpatory evidence he now offers. The jury actually heard taped phone conversations in which Mr. Watson “attempted to fabricate a false alibi with the coerced cooperation of third parties.” *Watson*, 207 F. App’x at 915. Viewed in that context, the similar evidence he offers now to overcome the government’s case against him does not constitute clear and convincing evidence that would compel a reasonable factfinder to acquit.

We therefore DENY the motion for authorization. This order “shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.” 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", written in black ink on a light-colored background.

ELISABETH A. SHUMAKER, Clerk